

1 SPENCER M. JUDD, ESQ.
 2 Nevada Bar No. 10095
 3 325 South 3rd St., #5
 4 Las Vegas, Nevada 89101
 Telephone: (702) 606-4357
 Facsimile: (702) 974-3146
 Attorneys for Plaintiff

5 **UNITED STATES DISTRICT COURT**
 6 **DISTRICT OF NEVADA**

7 In Re: 8 MAXINE BOONE, 9 Debtor.	10 Chapter 13 Case No.: 17-14408-mkn 11 Date of Hearing: January 10, 2018 Time of Hearing: 2:30 p.m.
--	---

12 **OPPOSITION TO MOTION FOR SANCTIONS FOR VIOLATION OF THE**
AUTOMATIC STAY

13 COMES NOW AVIKA LLC (“Avika”), by and through its attorney, Spencer M. Judd, and
 14 files this opposition to debtor’s Motion for Sanctions for Violation of the Automatic Stay.

15 The debtor filed for bankruptcy on or about August 14, 2017. Creditor Wells Fargo Bank,
 16 N.A. as Trustee for the Certificateholders of Banc of America Alternative Loan Trust 2004-7
 17 Mortgage Pass-Through Certificates, Series 2004-7 was the Beneficiary of a Deed of Trust
 18 security a Note executed by Debtor. The Trustee of that Deed of Trust, clear Recon Corp had sent
 19 a Notice of Breach and Election to Sale and a Notice of Sale to the Debtor. A sale of the property
 20 encumbered by the Deed of Trust was scheduled for the morning of August 15, 2017.

22 The Sale was conducted by the Trustee on August 15, 2017. Avika was the high bidder
 23 and was provided a Trustee’s Deed Upon Sale afterwards. Avika had received no notice of the
 24 bankruptcy filing by the Debtor either prior to, at or after the sale until after the Trustee’s Deed
 25 Upon Sale had been recorded. On August 18, 2017, Avika sent a notice to the “Occupant” of the
 26 property it had “purchased” notifying them of the Trustee Sale and that it, Avika, was the party
 27 that purchased the property at the Sale. The Trustee’s Deed was provided to Avika by the Trustee

1 that conducted the sale on August 24, 2017, and said Deed was immediate recorded with the Clark
2 County Recorder. As of August 24, 2017, no notice of bankruptcy filing had been given the
3 Avika.

4 Avika was notified in mid September, 2017, of the bankruptcy filing by the Debtor and
5 immediately contacted the Trustee that conducted the sale to try to arrange a reversal of the
6 transaction.

7 Upon information and belief, the Trustee was notified by the Clark County Recorder that it
8 could not “undo” a recording of a Trustee’s Deed without an Order from a Court of competent
9 jurisdiction. Wells Fargo Bank, N.A. as Trustee for the Certificateholders of Banc of America
10 Alternative Loan Trust 2004-7 Mortgage Pass-Through Certificates, Series 2004-7 filed a
11 Complaint for Declaratory Relief in the Eighth Judicial District Court, Clark County, Nevada, on
12 November 29, 2017 in which is named Avika LLC as a Defendant and therein asked the Court for
13 an Order entitling them to rescind the Trustee’s Deed issued by the appointed Trustee. That case is
14 pending.

15 Avika has ceased all attempts to exercise control of the property and has not had any
16 contact with the Debtor and/or the Occupant of the property since it received notice of the
17 bankruptcy filing. (See Declaration in Support of Opposition to Motion for Violation of the
18 Automatic Stay filed concurrently with this Opposition.)

19 Civil contempt involves maliciousness and a deliberate disregard of bankruptcy rules. *See,*
20 *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098 (2d Cir 1990) (contempt involves
21 maliciousness or lack of a good faith argument and belief that the party’s actions were not in
22 violation of a bankruptcy stay); *Fidelity Mortg. Investors v. Camelia Builders, Inc.*, 550 F.2d 47
23 (2d Cir 1976) (allowing imposition of costs under civil contempt powers for acts which bankruptcy
24 judge found were done with knowledge of automatic stay and deliberate disregard of bankruptcy
25 rules regarding requirements for relief).

1 Courts have held that 11 USC §105(a) may not be used to expand the scope of judicial
2 power beyond that granted in other sections of the Bankruptcy Code, and may only be used in
3 furtherance of, and not in conflict with other provisions. *See In re Women First Healthcare, Inc.*
4 332 BR 115 (Bankr. D. Del 2005); *In re Silvus*, 329 BR 193 (Bankr. E.D. Va. 2005); *In re Carlin*,
5 328 B.R. 221 (B.A.P. 10th Cir. 2005)

6 When considering whether to order sanctions or damages in this case, the court should not
7 use Section 105(a) as an unlimited ability to use sanctions where there has not been a willful
8 violation or material injury to the debtors. Further, the court must consider the specific facts of a
9 case prior to any levy of sanctions. *In re Brockington*, 129 BR 68 (Bankr D. S.C. 1991); *In re*
10 *Zunich* 88 BR 721 (Bankr. W.D. Pa. 1988).

12 In this case, the debtors' allegations in the motion do not rise to the level required for entry
13 of an order of civil contempt or sanctions under 11 USC §105(a) or 11 USC §362.

14 In his motion, debtor argues that sanctions are warranted. Debtor cited *In re Dawson*, (346
15 B.R. 503 (N.D.Cal. 2006) (cited by Debtor as 246 B.R. 503), to demonstrate that a Court may
16 award emotional distress damages. In *Dawson* the bank did not rescind its foreclosure for five
17 months. Here, upon receipt of notice of the bankruptcy filing, the parties CEASED all collection
18 actions against the Debtor, attempted to rescind the Trustee's Deed, which was not allowed by the
19 County Recorder's Office, and immediately filed a lawsuit for declaratory relief so that the Deed
20 could be rescinded.

22 Debtor has made no effort nor has she provided any proof in her pleading that she notified
23 the bank of her renewed intention to file bankruptcy or that she notified the Trustee prior to the
24 sale conducted on August 15, 2017 to aide in its assertion that there was a "willful" violation of the
25 stay in conducting the sale or in purchasing the property at the sale.

27 Debtor asks for an award of attorney fees for having to bring this motion; yet attorney fees
28 are not damages. Attorney fees should not, on their own, constitute damages that can be awarded

1 to a debtor. In other bankruptcy contexts, courts have held that “costs and attorney fees are
2 allowable only to embellish actual damages.” *In re Whitt*, 79 BR 611 (Bankr. E.D. Pa. 1987). In
3 this case, the debtors have not demonstrated any actual damages. As such, attorney fees should not
4 stand alone to create a basis for this court to award damages.

5 Given the circumstances as outlined above and because the debtor is unable to show that
6 Avika violated the automatic stay or caused the debtor to suffer damages, sanctions are not
7 warranted in this matter.
8

9 WHEREFORE, Avika asks that this Court deny the debtor’s motion.

10 DATED this 2nd day of January, 2018.

11 SJ Law
12
13

14 /s/ Spencer M. Judd
15 SPENCER M. JUDD, ESQ.
16 325 So. 3rd Street, #5
17 Las Vegas, NV 89101
18 (702) 606-4357
19 Attorneys for Avika LLC
20
21
22
23
24
25
26
27
28